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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

PABLO HERNANDEZ,

Defendant and Appellant.

B209334

(Los Angeles County  
Super. Ct. No. NA074503)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Tomson T. Ong, Judge. Remanded with directions and affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Pablo Hernandez appeals from the judgment following his conviction for assault on a police officer, resisting an officer and misdemeanor battery. Hernandez challenges the court's imposition of the upper term for the assault, its failure to stay the sentence for resisting arrest and its decision not to strike his prior conviction under the authority of *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). We affirm.

### FACTS

Long Beach police received a report that Hernandez had battered his girlfriend, Lety Olivas, and that an arrest warrant had been issued for his parole violation. Officers Dapello and States saw Hernandez on the street, approached him and attempted to place him under arrest. As Dapello was about to handcuff Hernandez he broke free and ran. Dapello gave chase and caught up with Hernandez as he attempted to scale a brick wall. When Hernandez refused Dapello's order to get down from the wall, Dapello struck Hernandez on his legs with a baton causing him to drop from the wall. Once on the ground, Hernandez punched Dapello twice on the shoulder and ran. Again, Dapello ran after him. Eventually Hernandez stopped running, turned to face Dapello and raised his hands in a "fighting stance." As Dapello swung his baton at Hernandez' midsection Hernandez grabbed onto the baton. The two men struggled for possession of the baton and Hernandez succeeded in taking it away from Dapello. Having wrested the baton from Dapello, Hernandez cocked it like a baseball batter about to swing. Dapello testified Hernandez looked "angry," "mad," like "he's going to hit me" and like he "want[ed] revenge." Dapello drew his gun and shot Hernandez twice.

A jury convicted Pablo Hernandez of assault on a peace officer, resisting an officer and battery, and found that Hernandez personally used a deadly weapon in committing the first two offenses. Hernandez admitted to a prior "strike" conviction, a prior serious felony conviction under Penal Code section 667, subdivision (a),<sup>1</sup> and that

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<sup>1</sup> All statutory references are to the Penal Code.

he had served two prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced Hernandez to a prison term of 18 years, four months consisting of the upper term of 10 years on the assault conviction, (5 years doubled under the Three Strikes law for a second strike), a consecutive term of 16 months on the resisting arrest conviction, (one-third the midterm doubled under the Three Strikes law),<sup>2</sup> 5 years for the section 667.5 conviction and 2 years for the two prior prison terms. The court also imposed a consecutive one year in county jail for the misdemeanor battery conviction. Hernandez filed a timely appeal.

## DISCUSSION

### I. THE UPPER TERM SENTENCE FOR ASSAULT ON A POLICE OFFICER

Hernandez contends the trial court erred in imposing the upper term for the assault conviction (Count1) because it relied on an improper aggravating factor and that his trial counsel furnished ineffective assistance by not objecting to the sentence. Because we conclude that the court did not err in imposing the upper term counsel's failure to object did not constitute inadequate representation.

Following the United States Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. 270, the Legislature adopted Penal Code section 1170, subdivision (b), effective March 30, 2007. Section 1170, subdivision (b), provides that when a "statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." In May 2007, the Judicial Council amended the California Rules of Court governing sentencing to conform to the statutory change. Rule 4.420, subdivision (b) as amended provides in relevant part: "In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, *and any other factor reasonably related to the sentencing decision.*" (Italics

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<sup>2</sup> Although the court ordered the sentences on counts 1 and 2 to run consecutively, the Abstract of Judgment indicates at one place the sentences are to run concurrently and at another that they are to run consecutively. We will direct the court to correct the Abstract of Judgment.

added.) Under the revised rules, the court is no longer required to find “facts” in mitigation or aggravation but must state its “reasons” for imposing the upper, middle or lower term. (Cal. Rules of Court, rule 4.420, subd. (e); *People v. Sandoval* (2007) 41 Cal.4th 825, 847.) The rules retain the prohibition on the dual use of facts to impose an upper term. Thus, under rule 4.420, subdivision (c), a fact charged and found as an enhancement cannot be used as a reason for imposing an upper term unless the enhancement is stricken. And, under rule 4.420, subdivision (d), “[a] fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term.”

In sentencing Hernandez to the upper term on the assault conviction, the trial court stated it was “exercising its discretion giving [Hernandez] the five-year term” because “there are multiple victims in this case. Counts 1 [assault on Dapello] and 3 [battery on Olivas] have different victims, actually, this is an issue where Mr. Hernandez is escalating the situation. From a misdemeanor domestic violence all the way to assaulting a peace officer and there are multiple victims.”

Hernandez argues that the court erred in basing the upper term on the fact that there were different victims in counts 1 and 3. We need not decide whether the court properly relied on multiple victims in selecting the upper term because the record shows that Hernandez was on parole at the time he committed the crimes and that reason alone supports the imposition of the upper term. (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.)

## **II. THE FAILURE TO STAY THE SENTENCE FOR RESISTING AN OFFICER**

The court sentenced Hernandez for assault on a peace officer (count 1) and imposed a separate consecutive sentence for resisting an officer (count 2). Hernandez maintains that the court should have stayed the sentence for resisting an officer under section 654 because his sole objective in committing both crimes was to avoid arrest. Substantial evidence supports the court’s consecutive sentence.

*People v. Martin* (2005) 133 Cal.App.4th 776, 781 explains: “Section 654 provides in part: ‘An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, *but in no case shall the act or omission be punished under more than one provision.*’ . . . A course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishment. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) ‘If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ (*People v. Perez* (1979) 23 Cal.3d 545, 551.) If, on the other hand, ‘the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)”

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. We will not reverse the court’s finding if there is substantial evidence to support it. We review the court’s determination in the light most favorable to the judgment and presume the existence of every fact the trial court could reasonably deduce from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

One relevant consideration in determining whether two offenses were incident to separate objectives is their temporal proximity. Evidence that the offenses occurred over a period of time which allowed for reflection supports a finding that the crimes were committed in pursuit of separate objectives. (*People v. Surdi* (1995) 35 Cal.App.4th 685, 689.)

Here, the court found the assault and resisting an officer “did not occur all at the same time. They occurred at different times, in different locations.” We presume that by this observation the court meant that Hernandez had time for reflection between the time he resisted arrest at the wall, where he punched Officer Dapello twice on his shoulder

then ran, and the time when he stopped running, wrested the baton from Dapello and acted as if he intended to attack Dapello with it. The court could reasonably conclude that at this point Hernandez' immediate objective changed from escaping pursuit to inflicting serious physical injury on his pursuer.

### **III. THE COURT'S REFUSAL TO STRIKE DEFENDANT'S STRIKE CONVICTION**

Hernandez has one prior strike, a 1999 conviction for robbery.

After the jury returned its verdicts in this case, Hernandez retained new counsel to represent him in sentencing. The new attorney made an oral request that the court strike Hernandez' robbery conviction under *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497, but offered no evidence and presented no oral or written argument in support of the request. The court considered the request, nevertheless. In doing so, the court stated that it had taken into account those factors identified in *Romero, supra*, and *People v. Williams* (1998) 17 Cal.4th 148 that it found "significant" in this case, including whether the defendant would likely conduct his life in a law abiding manner in the future, the nature of the current offense, the defendant's age when he committed it and the date of the prior strike conviction. The court stated that after "weighing and considering the factors, under *Romero*, that this court considers significant . . . this court respectfully [declines] to strike that strike . . . ."

The gist of Hernandez' argument on appeal is that the court failed to consider that "appellant has already been severely punished for his crimes in the form of being shot twice by an inexperienced officer, causing appellant to lose a kidney; that appellant has recently become a father; and that the punishment imposed by the State can still be severe even if the court dismissed the strike allegation—a maximum of twelve years, eight months at eighty-five percent." Again, we disagree.

Hernandez did not ask the trial court to consider what he now offers as grounds for granting the motion nor did he offer evidence to the trial court that he lost a kidney or that he recently became a father. In any case, on appeal he does not explain why being shot in self-defense by the officer he was threatening with a deadly weapon, fatherhood, or the

authority of the trial court to impose a sentence he would prefer are relevant to striking his prior robbery conviction.

In any case, the court did not abuse its discretion in denying the request to strike the strike. We cannot conclude the court acted so irrationally or arbitrarily that no reasonable person could agree with the denial of the requested relief. The court considered what it believed to be the relevant factors and Hernandez does not contend that any of these factors were irrelevant or impermissible.

### **DISPOSITION**

The case is remanded to the trial court with directions to correct the abstract of judgment to reflect that counts 1 and 2 are to run consecutively and to forward a corrected certified copy of the abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

FERNS, J.\*

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\* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.